Timothy Hatch v Ting Ing Thai & Anor

HIGH COURT (KUCHING) — SUIT NO KG76 OF 1982
ABDUL KADIR SULAIMAN J
14 JANUARY 1994

Civil Procedure *— Trial — Application for order that plaintiff submits himself to be medically examined — Application made after trial commenced — Whether application properly made — Whether court conferred with jurisdiction to hear application half way through the trial — Rules of the High Court 1980 O 25 r 8(3)*

The defendants, by an application under O 25 r 8(3) of the Rules of the High Court 1980 ('the RHC'), sought for an order that the plaintiff submits himself to be medically examined to determine his latest medical condition and residual disability, if any. The plaintiff by his affidavit-in-opposition, objected to the application by the defendants. Since the application was made after the trial had commenced, the issue for the court to consider was whether it was properly made. If it was not properly made, the court would not be conferred with the jurisdiction to hear the application half way through the trial.

Held, dismissing the application:
Once the trial has commenced, the court has no jurisdiction to hear an application made under O 25 r 8(3) of the RHC. This rule is not an independent rule but is tied down to O 25 r 8(1). Order 25 r 8(1) concerns directions which shall take effect automatically without the parties having to take out a summons in Form 46 as required by O 25 r 1(1) or (4) of the RHC. These automatic directions will take effect when the pleadings in an action are deemed to be closed, ie before the trial is set down as required under Item 28 of Form 46. The phrase 'for such further or different directions or order as may be, in the circumstances, be appropriate' appearing in O 25 r 8(3) must necessarily relate to a variation of the automatic directions mentioned in paras (a)–(g) to suit the circumstances. In any event, this variation should be applied before the trial of an action. It is not to be taken to mean any further or different directions or order whensoever made.

[Bahasa Malaysia summary

Defendan, melalui suatu permohonan di bawah A 25 k 8(3) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT itu'), telah memohon untuk suatu perintah supaya plaintif menjalani pemeriksaan perubatan untuk menentukan keadaannya yang terkini dari segi perubatan dan sebarang kecacatan saki-baki, jika ada. Plaintif, melalui afidavit pembangkangnya, telah membuat bantahan terhadap permohonan defendan itu. Oleh kerana permohonan itu telah dibuat selepas perbicaraan telah bermula, isu untuk pertimbangan mahkamah adalah sama ada permohonan itu

telah dibuat dengan betul. Jika permohonan itu tidak dibuat dengan betul, mahkamah tidak akan diberi bidang kuasa untuk mendengar permohonan itu di pertengahan perbicaraan itu.

Diputuskan, menolak permohonan itu:
Sebaik sahaja perbicaraan itu telah dimulakan, mahkamah tidak mempunyai bidang kuasa untuk mendengar suatu permohonan di bawah A 25 k 8(3) KMT itu. Kaedah ini tidak merupakan suatu keadah yang berasingan tetapi adalah berkaitan dengan A 25 k 8(1). Aturan 25 k 8(1) adalah berkaitan dengan arahan yang semestinya berkuatkuasa secara automatik tanpa memerlukan supaya pihak kepada kes itu memohon untuk mendapat suatu saman dalam Borang 46 seperti yang dikehendaki oleh A 25 k 1(1) atau (4) KMT itu. Arahan automatik ini akan berkuatkuasa apabila pliding di dalam suatu tindakan disifatkan sebagai telah tutup, iaitu sebelum guaman itu ditetapkan untuk perbicaraan sebagaimana yang dikehendaki di bawah Butiran 28 di dalam Borang 46. Frasa 'untuk mendapatkan apa-apa arahan atau perintah lanjut atau berlainan sebagaimana yang, mengikut hal-hal keadaan, adalah sesuai' di dalam A 25 k 8(3) semestinya berkaitan dengan suatu perubahan kepada arahan automatik yang diperuntukkan di dalam perenggan (a)–(g) mengikut hal-hal keadaan. Walau bagaimanapun, perubahan ini sepatutnya dibuat sebelum perbicaraan sesuatu tindakan. Ianya tidak sepatutnya bermaksud sebarang arahan atau perintah lanjut atau berlainan bila-bila masa ianya dibuat.]

Legislation referred to
Rules of the High Court 1980 O 25 r 8(3)

SY Chan (*Ee & Lim Advocates*) for the plaintiff.
Albert Tang (*Chew, Jugah, Wan Ullok, Goh & Co*) for the defendants.

Cur Adv Vult

Abdul Kadir Sulaiman J: This is an application by the defendants made by a summons-in-chambers pursuant to O 25 r 8(3) of the Rules of the High Court 1980 ('the RHC'). The said rule states as follows:

> Nothing in paragraph (1) shall prevent any party to an action to which this rule applies from applying to Court for such further or different directions or order as may, in the circumstances, be appropriate.

The applicant by this application sought for an order that the plaintiff submits himself to be medically examined by an orthopaedic surgeon, Dr Vaikunthan in Kuala Lumpur, at the expense of the defendants, to determine his latest medical condition and residual disability, if any. The plaintiff by his affidavit-in-opposition, affirmed on 1 October 1993, objected to the application by the defendants.

Rule 8(3) is part of O 25 of the RHC. Order 25 pertains to the summons for directions in preparation for the trial of an action before the court. In other words, it concerns pre-trial directions so that all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with before the trial of an action. The directions may be given as to the future course of the action to secure the just, expeditious and economical disposal thereof. See O 25 r 1. Since this application is made after the trial has commenced, the issue for me to consider is whether it is properly made. If it is not properly made, I would not be conferred with the jurisdiction to hear the application half way through the trial. Whatever discretion given to me must be exercised judiciously. The plaintiff has given his evidence and has so far spent three days for cross-examination by the defendant. So, before considering the merits of the application, I asked both parties to submit on the question of jurisdiction.

However, instead, the learned counsel for the applicant made an oral application for the court to exercise its inherent jurisdiction for the stay of the proceedings in the trial as an alternative to his present application under O 25 r 8(3) of the RHC. I turned down the application made orally and invited the applicant to make a formal written application, as to my mind, the two intended applications relate to different matters, one to require the order of the court for the plaintiff to submit himself for the medical examination and the other to require the court to order a stay of the trial, presumably pending the submission of the plaintiff for medical examination.

The learned counsel for the plaintiff objected to the oral application made. If a formal written application is made, the plaintiff would be given the opportunity to make the necessary evidence available as to why the order for stay should not be granted. I agree with the submission of the counsel for the plaintiff. On the question of jurisdiction to hear applications under O 25 r 8(3) of the RHC, the learned counsel for the plaintiff submits that as it stands, the application under the said order cannot succeed as the trial has commenced. To this, the learned counsel for the applicant then applied for an adjournment of the applicant's summons-in-chambers to enable the applicant either to incorporate an application for stay in the summons-in-chambers or to put up a fresh application for stay. I refused the application for an adjournment as I see no purpose to it. On the issue of incorporation of the two intended applications, as stated earlier, they are in respect of divergent purposes. On the issue of putting up a fresh application for stay, there would then be two application in court and as such I see no reason why this present application be adjourned simply to wait for the other application. I therefore requested the learned counsel for the applicant to submit on the question of my jurisdiction to hear this present application. The reply given by the learned counsel was that he was not prepared to so submit as he had found no authority on the point. He, therefore, applied to withdraw the present application with liberty to file a fresh application to invoke the court's inherent jurisdiction for stay of the trial. I see no purpose in allowing the application to be so withdrawn and instead I dismissed the

present application made under O 25 r 8(3) of the RHC as it was made after the trial had commenced.

I now give my reasons for the decision so made. I am of the opinion that once the trial has commenced, as is in this case, the court has no jurisdiction to hear an application made under O 25 r 8(3) of the RHC. This rule is not an independent rule but is tied down to O 25 r 8(1). Order 25 r 8(1) concerns directions which shall take effect automatically without the parties having to take out a summons in Form 46 as required by O 25 r 1(1) or (4) of the RHC. These automatic directions will take effect when the pleadings in an action are deemed to be closed, ie before the trial is set down as required under Item 28 of Form 46. The phrase 'for such further or different directions or order as may be, in the circumstances, be appropriate' appearing in O 25 r 8(3) must necessarily relate to a variation of the automatic directions mentioned in paras (a)–(g) to suit the circumstances. In any event, this variation should be applied before the trial of an action. It is not to be taken to mean any further or different directions or order whensoever made.

In the light of the above, I order the continued hearing of the suit to proceed and the learned senior assistant registrar is to fix an early date for the purpose. This application of the defendant under O 25 r 8(3) of the RHC is dismissed with costs to the plaintiff in any event, to be taxed, unless agreed.

Application dismissed.

Reported by Jeanne Tan